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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MONTANA,

Petitioner,

v.

DONALD P. HODEL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 449-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. In the Surface Mining Control and Reclamation Act, Congress established an abandoned mine reclamation fund consisting of fees collected from current mining operations and directed in Section 1232(g)(2) of the Act that 50 percent of the fees collected in an Indian reservation be allocated to that reservation and that 50 percent of the fees collected in the State be allocated to the State for the purpose of reclaiming the land. The first question presented here is whether a regulation promulgated by the respondents conflicts with Section 1232(g)(2) because it allocates to Indian tribes fees collected *outside* reservation boundaries and thereby places the tribe in charge of conducting reclamation activities, including the construction of public facilities, in non-reservation areas populated by non-Indians over which the tribe has no jurisdiction or responsibility.

2. The second question presented is whether the decision of the court of appeals upholding a regulation that interprets the statutory language "Indian reservation" to mean off-reservation mineral rights conflicts with *Escondido Mutual Water Co. v. LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians*, 104 S.Ct. 2105 (1984), which held that the statutory language "Indian reservation" could not be construed to include off-reservation water rights.

PARTIES TO THE PROCEEDING

The parties here are the State of Montana; Donald P. Hodel, Secretary of the Interior; Jed D. Christensen, Acting Director of the Office of Surface Mining Reclamation and Enforcement, Department of Interior; The Department of the Interior; and the Crow Tribe of Indians.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 749 F.2d 740. On February 6, 1985, the panel issued an order amending its opinion (App. 38a, *infra*). The opinion of the district court (App. 28a, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1984 (App. 43a, *infra*). On February 11, 1985, the court denied a timely petition for rehearing (App. 40a-42a, *infra*). On May 6, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the district court rested on 30 U.S.C. § 1276(a)(1) and 28 U.S.C. § 1331.

STATUTES AND REGULATION INVOLVED

1. Section 1232 of Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1232), provides in relevant part:

> § 1232. Reclamation fee
>
> (a) Payment; rate
>
> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.
>
> . . .
>
> (g) Allocation of funds
>
> (1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.
>
> (2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. Where the Governor of a State or the head of a governing body of a tribe certifies that (i) objectives of the fund set forth in sections 1233 and 1239 of this title have been achieved, (ii) there is a need for construction of specific public facilities

> in communities impacted by coal development, (iii) impact funds which may be available under provisions of the Federal Mineral Leasing Act of 1920, as amended [30 U.S.C.A. § 181 et seq.], or the Act of October 20, 1976, Public Law 94-565 (90 Stat. 2662) [31 U.S.C.A. § 1601 et seq.], are inadequate for such construction, and (iv) the Secretary concurs in such certification, then the Secretary may continue to allocate all or part of the 50 per centum share to that State or tribe for such construction: *Provided, however,* That if funds under this subparagraph (2) have not been expended within three years after their allocation they shall be available for expenditure in any eligible area as determined by the Secretary.
>
> (3) The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this subchapter. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 1235 of this title when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States those projects funded directly or in conjunction with other Federal agencies.

2. Section 872.11(b)(3) of the regulations promulgated under Subchapter IV of the Surface Mining Control and Reclamation Act (30 C.F.R. § 872.11(b)(3)), provides in relevant part:

> An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. . . .

STATEMENT

This case arises under Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.

§ § 1231-1243). While other portions of the Act are concerned with the regulation of current mining activities, Subchapter IV is directed to repairing the damage done to the land by mining conducted prior to August 3, 1977, when the Act became effective.

In order to alleviate such pre-1977 environmental damage, Subchapter IV created on the books of the Department of the Treasury a trust fund entitled the Abandoned Mine Reclamation Fund to be administered by the Secretary of the Interior. 30 U.S.C. § 1231. The Fund consists primarily of reclamation fees paid by current coal mine operators on each ton of coal produced after the Act's effective date. 30 U.S.C. § § 1231-1232. In a provision critical to this case, Section 1232(g)(2) of Subchapter IV divides these fees as follows: "Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter." 30 U.S.C. § 1232(g)(2).

Expenditures from the fund are to be used for, among other purposes, "the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by prior coal mining practices." 30 U.S.C. § 1233(5). The geographical allocation of expenditures must reflect both the area from which the fees are collected and national needs. 30 U.S.C. § 1232(g)(1).

On June 30, 1982, the Department of the Interior promulgated final regulations purportedly implementing Subchapter IV's Abandoned Mine Reclamation Program. 47 Fed. Reg. 28574. Section 872.11(b)(3) of the regulations is the regulatory counterpart of Section 1232(g)(2) of Subchapter IV of the Act, which allocated money from the Abandoned Mine Reclamation Fund to States and Indian reservations on the basis of where the money is collected. This regulation altered the statutory language by allocating funds derived from "Indian lands" to the "Indian tribe" rather than allocating funds collected in an

"Indian reservation" to that reservation, as the statute provided. Because the phrase "Indian lands" is viewed by the federal respondents to include areas outside an Indian reservation's boundaries where the Tribe's only claim is to mineral interests (30 U.S.C. § 1291(9)), the regulation had the effect of depriving States of reclamation funds collected on such off-reservation lands.[1]

During the rulemaking proceeding, the States of Montana and New Mexico had submitted comments on Section 872.11(b)(3) protesting this proposed amendment of the statutory language. Although the Department of the Interior evaluated and considered the States' comments, it decided to retain the language of the proposed regulation. 47 Fed. Reg. 28580.[2] According to the explanation accompanying proposed Section 872.11(b)(3), the "Indian reservation" language of the statute should not be used to implement the Act although the term "Reservation" is "defined by law while a definition of 'Indian lands' is not available." 46 Fed. Reg. 60782. The federal respondents further "explained" that under the regulation reclamation fees collected outside an Indian reservation, but arguably on "Indian lands," would remain in a state of limbo "[u]ntil this definition problem is resolved." 46 Fed. Reg. 60782.[3]

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[1]As promulgated on June 30, 1982, the final regulation tracked the language of a previous regulation issued by the Department of the Interior in 1978, which had not been subjected to judicial review. *See* 43 Fed. Reg. 49932 (Oct. 25, 1978).

[2]On behalf of the State of Montana, Governor Schwinden commented on Section 872.11(b)(3), pointing out that the proposed regulation was much broader than the allocation provision in the statute, which is restricted to "Indian reservation," and that the proposed regulation would cost the State of Montana millions of dollars in lost "reclamation funds which could be used reclaiming hazardous abandoned mine lands." Admin. R. 117-118.

On similar grounds, New mexico also protested the alteration of the statute embodied in the proposed regulation *Id.* at 115-116.

[3]As originally drafted, the regulation used the statutory language and provided, as does Section 1232(g)(2) of the Act, that fifty percent of the funds collected in an "Indian reservation" would be allocated to that "Indian reser-

The impact of the regulation fell on the State of Montana, where there are more than 1 million acres known as the "ceded strip." Coal mining is being conducted on the ceded strip and reclamation fees are being collected there. The ceded strip is not within an "Indian reservation"[4] and the surface area is populated by non-Indian citizens of the State. Within the ceded strip, the Crow Tribe claims beneficial ownership of subsurface coal deposits.[5] The regulation's amendment of the statute thus effectively deprived the State of Montana of the more than $700,000 in reclamation fees collected yearly in the ceded strip, even though such reclamation fees are not collected in any "Indian reservation" as the statute requires before the tribe may receive such fees.

On August 27, 1982, the State of Montana filed an action for judicial review in district court under Section 1276(a)(1) of the Act, challenging Section 872.11(b)(3) of the regulations as arbitrary, capricious and unlawful. On December 22, 1982, the

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reservation." 46 Fed. Reg. 60782 (December 11, 1981). When the rulemaking proceeding was begun in December 1981, the federal defendants stated that the "preproposed" Section 872.11(b)(3) had been "in error" in using Congress' language "Indian reservation" and that this supposed error had been corrected by substituting "Indian lands" in the proposed regulation. 46 Fed. Reg. 60782 (December 11, 1981).

[4]*See Little Light v. Crist*, 649 F.2d 683, 685 (9th Cir. 1981); and *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981).

[5]The Crow Reservation was first established by the Treaty of Fort Laramie of 1851 (11 Stat. 749) and later reduced in size by a second treaty, the Treaty of Fort Laramie of 1868 (15 Stat. 649) and by later statutes. Act of April 11, 1882, ch. 74, 22 Stat. 42; Act of July 10, 1882, ch. 284, 22 Stat. 157; Indian Appropriations Act of March 3, 1891, ch. 543, 26 Stat. 989, 1039; Act of April 27, 1904, ch. 1624, 33 Stat. 352. In the last of these statutes, the Crow Tribe ceded an area of approximately 1,137,500 acres, now called the "ceded strip," to the United States. Under the 1904 Act, the federal government held the land in trust for the Tribe for entry by non-Indians and the Tribe received the proceeds from disposition of the land. *See* 33 U.S.C. § 357; *Ash Sheep Co. v. United States*, 252 U.S. 159, 163-166 (1920). The area was largely settled by non-Indians and, as the federal respondents admitted in the courts below, most of the surface area of the "ceded strip" is now owned in fee by non-Indians.

district court granted the motion of the Crow Tribe of Indians to intervene as a defendant. The parties then filed cross motions for summary judgment.

On June 30, 1983, without hearing oral argument, the district court issued a written opinion granting the defendants' motions for summary judgment and dismissing the State's suit. App. 28a, *infra*. The court held that although there were persuasive arguments in favor of the State's position regarding the invalidity of the regulation, the court should defer to the agency and uphold Section 872.11(b)(3). App. 35a, *infra*.

The court of appeals upheld the regulation in an opinion by Judge Wright. Without saying whether the regulation accurately interpreted "Indian reservation" in Section 1232(g)(3) to mean non-reservation, and without addressing the federal respondents' explanation for altering the statutory language, the panel held that because the regulation was "reasonable," it was valid. In order to furnish some basis for the regulation, Judge Wright engaged in a lengthy discussion of provisions in the Act other than those in Subchapter IV and Section 1232(g)(2). App. 15a-19a, *infra*.

In the original opinion, the decision to "defer" in favor of the regulation apparently rested on the court's conclusion that States were barred from engaging in reclamation activities on "Indian lands," both on reservation and off. App. 16a, *infra*.On rehearing, after the State pointed out that the opinion had incorrectly relied upon provisions of the Act concerning *current* mining operations and reclamation as distinguished from reclamation of *abandoned* mines, and had distorted a statutory provision by deleting critical language, the panel issued an order revising its opinion but adhering to its decision sustaining the regulation. App. 39a, *infra*.

REASONS FOR GRANTING THE WRIT

This is a case of profound importance to the State of Montana. A vast area of the State populated by non-Indians and outside the boundaries of any Indian reservation is affected.

The decision of the court of appeals deprives the State of millions of dollars in abandoned mine reclamation fees collected in this area and of jurisdiction to conduct a reclamation program for the area pursuant to Subchapter IV of the Surface Mining Control and Reclamation Act of 1977. The court of appeals reached this result by sustaining a regulation that revised the statutory language "Indian reservation" to mean "non-reservation" and to include areas outside reservation boundaries where the tribe claims only subsurface mineral rights. In upholding this regulation, which is contrary to the clear command of the statute, the court below placed itself in conflict with a recent decision of this Court interpreting identical statutory language, contradicted settled principles of statutory construction and administrative law and then sought to justify its result on grounds never considered by the agency that promulgated the regulation.

Congress passed Subchapter IV of the Act in order to correct environmental damage to land and water caused by coal mining activities prior to 1977. Subchapter IV established the Abandoned Mine Reclamation Fund, which the Secretary of the Interior administers. The fund is financed through fees paid by coal mine operators on coal produced by surface and underground mining. 30 U.S.C. § § 1231, 1232(a). Moneys from the fund are to be used to support federal, state and Indian reclamation projects designed to restore the environment previously damaged by coal mining practices and to enhance utilities, roads, recreation and conservation facilities adversely affected by coal mining activities. 30 U.S.C. § 1233. With respect to how the money from the fund is to be apportioned, Congress provided that the "geographic allocation of expenditures for the fund shall reflect both the area from which the revenue was derived" and national needs. 30 U.S.C. § 1232(g)(1).

In addition to these general instructions, Congress specifically directed how fees are to be allocated between States and Indian reservations. The provision critical to this case, Section 1232(g)(2), provides in relevant part that (30 U.S.C. § 1232(g)(2)) (emphasis added):

> Fifty per centum of the funds collected annually in any state or *Indian reservation* shall be allocated to that State or *Indian reservation* by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. . . .

The regulation at issue here—Section 872.11(b)(3)—drastically altered this statutory allocation by deleting the references to "Indian reservation," and providing instead that (30 C.F.R. § 872.11(b)(3)) (emphasis added):

> An amount equal to 50 percent of the reclamation fees collected from *Indian lands* shall be allocated to the *Indian tribe* having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. . . .

The language change from the statute to the regulation is highly significant for the State of Montana. The federal respondents define "Indian lands" to include not only lands "within the exterior boundaries of any Federal Indian reservation" but also any areas where there are "mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9). As so viewed, the phrase "Indian lands" contained in Section 872.11(b)(3) of the regulations means something far different than the phrase "Indian reservation" contained in Section 1232(g)(2), its statutory counterpart. Under the regulation, therefore, abandoned mine reclamation fees collected in the "ceded strip"[6] would go to the Crow Tribe even though the area is not part of the Reservation, even though the area involved is populated by non-Indians and even though Congress specifically decided that only moneys collected from coal mining *in a reservation* should be allocated to that Indian reservation under Section 1232(g)(2) of the Act.

Escondido Mutual Water Co. v. LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians, 104 S.Ct. 2105 (1984), presented a quite similar issue involving the inter-

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[6]See p.6 *supra*.

pretation of identical language. In *Escondido* the lower court had viewed the phrase "within any [Indian] reservation" in Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) as ambiguous because it did not include tribal water rights outside a reservation. 104 S.Ct. at 2114. This Court disagreed. The Court held that statutory language was "plain." 104 S.Ct. at 2115. The phrase "within any [Indian] reservation" painted a clear geographical picture. *Ibid.* Indeed, the notion that there was some need for altering the statutory language was "quite untenable." *Ibid.* The lower court's refusal to accept the "literal" meaning of the statutory phrase "Indian reservation" was, as the Court held, nothing less than an "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists. . . ." 104 S.Ct. at 2115.

There is no functional difference between *Escondido* and this case. There the statutory language "Indian reservation" was misconstrued to include off-reservation water rights; here, it has been misconstrued to include off-reservation mineral rights. In *Escondido*, the Court rejected this attempted distortion of such "plain" language. The court of appeals had a duty to follow the same course here. Instead of doing so, the court below deemed *Escondido* "irrelevant," stating that there was no evidence Congress had relied on the Federal Power Act in passing Section 1232(g)(2). App. 15a n. 12, *infra*. But that was not the proper inquiry. The question was whether "Indian reservation" in Section 1232(g)(2) meant something far different than it ordinarily means[7]—namely, "non-reservation" mineral rights. The court below, despite its lengthy discourse on the Act, offers nothing to indicate that Congress could possibly have intended such a departure from common usage. *Escondido* thus stands firmly against the panel's decision.

What is remarkable here is that the federal respondents admitted that the language Congress chose in Section 1232(g)(2)—"Indian reservation"—was clear and unam-

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[7]This Court, for exampie, has made clear that its decisions "have established a fairly clean analytical structure" for determining the extent of an "Indian reservation." *Solem v. Bartlett*, 104 S.Ct. 1161, 1166 (1984).

biguous. Indeed, the federal respondents revised the statute because the statutory language was so plain. In a passage the court below did not address, respondents explained that the regulation deleted the statutory language despite the fact that the term "Reservation" is "defined by law while a definition of 'Indian lands' is not available" and that this alteration of the statutory language created a "definition problem." 46 Fed. Reg. 60782 (1981). Respondents thus conceded that their purpose was, as the Court stated in *Escondido*, "to circumvent the plain meaning of the statute by creating an ambiguity where none exists. . . ." 104 S.Ct. at 2115.

The court of appeals did not determine whether respondents' rewriting of "Indian reservation" to mean "non-reservation Indian lands" (App. 26a *infra*) accurately interpreted the statutory language. Instead, the court relied on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984), and pronounced respondents' regulation "reasonable" (App. 26a *infra*). But in doing so, the court misread *Chevron*, which requires first that a reviewing court determine "whether Congress has directly spoken to the precise question at issue." 104 S.Ct. at 2781. If the court below had undertaken this inquiry, as *Chevron* requires, it would have answered in the affirmative and, as *Chevron* further holds, struck down the regulation.

The precise question involved—how abandoned mine reclamation fees should be allocated—is not one on which "the statute is silent or ambiguous" (*id.* at 2782). Congress addressed the question directly: Section 1232(g)(2) provides in the clearest possible terms that only fees collected *within* an Indian reservation are to be allocated to that reservation. Under *Chevron*, the court of appeals therefore had no occasion to consider the "reasonableness" of respondent's regulation.[8]

[8]Congress left no statutory "gap" for the agency to fill (compare *Chevron*, 104 S.Ct. at 2782). Far from making a "legislative delegation" to the federal respondents, Congress required the Secretary to promulgate regulations under Subchapter IV "incorporating the provisions of this subchapter" (30 U.S.C. § 1235(a)). Section 872.11(b)(3) of the regulations violates this rather unusual provision because, instead of "incorporating" the language of Section 1232(g)(2) in the regulation, the regulation deletes the statutory language.

Regardless whether the allocation of fees provided in the regulation was "reasonable," Congress decided on a different allocation.

Moreover, as we have discussed, respondents admitted that the statutory phrase "Indian reservation" was not ambiguous and revised the statutory language in order to create an ambiguity. The court of appeals' lengthy consideration of other provisions of the Act—provisions that deal with current mining operations and reclamation as distinguished from abandoned mine reclamation relating to pre-1977 mining operations[9]—is beside the point. Unlike *Chevron*, this case is not one in which "the agency considered the matter in a detailed and reasoned fashion" and weighed conflicting policies (104 S.Ct. at 2793).[10]

The regulation and the decision of the court of appeals upholding it ultimately defy common sense and contradict the policy recognized by this Court in *Solem v. Bartlett*, 104 S.Ct. 1161, 1167 n. 12 (1984), that "[w]hen an area is predominately

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[9]In its initial opinion, the court stated that the "Act unambiguously denies the state the power to administer funds on any Indian lands, on or off the reservation." App. 16a, *infra*. In support, the court misquoted a provision of the Act (30 U.S.C. § 1291(25)) that dealt *not* with Subchapter IV's *abandoned* mine reclamation, but with Subchapter V and reclamation with respect to current mining. When Montana pointed out the court's error on rehearing, the court revised its opinion (App. 38a-40a, *infra*) but sought to justify its conclusion by adding a lengthy footnote to the opinion (App. 39a-40a, *infra*).

The convoluted explanation in the court's footnote, however, only compounds the initial error in its opinion. The court correctly notes that before a State may receive its 50 percent share from the Fund, it must have an approved program to regulate current mining and reclamation (*ibid.*). But the court then concludes—without any basis whatsoever—that the approved State program regarding current mining *must* cover "the region in question"—here the ceded strip (*ibid.*). The Act, however, merely requires that a State regulatory program for current mining be in place so as to demonstrate the State's capability for conducting reclamation of abandoned mines, not that it cover a particular area. See 30 U.S.C. § 1235(c).

[10]Indeed the court of appeals never alludes to the agency's stated basis for promulgating the regulation.

populated by non-Indians" it is a serious burden on State government to hold that it is under tribal control. Here, Subchapter IV provides that expenditures from the fund should reflect the geographical area where the fees are collected. The fees allocated under fifty percent formula therefore may be used to construct "public facilities . . . in communities impacted by coal development." 30 U.S.C. § 1232(g)(2). Within a reservation, those "communities" presumably would consist of Indians. However, on "Indian lands" outside a reservation, such as the "ceded strip," where the tribe's only interest is in mineral rights, the "community" consists of non-Indians. Once the minerals are sold, the tribe has no further interest in the area.

In such off-reservation areas, Section 1232(g) of the Act by its terms allocates the funds for the construction of public facilities to the proper body—the State. In changing "Indian reservation" to "Indian lands," however, the regulation altered this statutory scheme by allocating the fees derived from such off-reservation areas to the Indian tribe holding the mineral interests, thereby putting an Indian tribe in charge of deciding whether and what public facilities are needed for non-Indian communities on non-reservation land and of constructing public facilities for non-Indians. The court below never explained how Congress could possibly have intended such an inscrutable result.[11] See *American Tobacco Co. v. Patterson*, 456 U.S. 63,

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[11]Indeed, Congress was not even sure that Indian tribes had limited jurisdiction to regulate their own *current* mining activities in such off-reservation areas where they held only mineral rights. Because of its uncertainty, Congress required in Section 1300 that the Secretary of the Interior "analyze and make recommendations regarding the jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations" (30 U.S.C. § 1300(h)). Congress further directed "That except as provided in section 1300 of this title the provisions of this chapter [Chapter 25—Surface Mining Control and Reclamation] *shall not be applicable to Indian lands.*" 30 U.S.C. § 1273(a) (emphasis added). The regulation at issue thus *directly contradicts* not only Section 1232(g)(2), but also this provision by making the allocation of reclamation funds turn on whether mining occurs on "Indian lands" rather than Indian reservations as Congress provided.

71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

Only review by this Court can correct the error of the court below. A conflict in the courts of appeals cannot arise in light the jurisdictional statute (30 U.S.C. § 1276(a)(1)). Unless this Court acts, the "ceded strip" will remain a regulatory no-man's land regarding reclamation of abandoned mines and, contrary to Congress' directive, the millions of dollars collected there will not be allocated to the State in order to further the statutory purposes of the abandoned mine reclamation program.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 449-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

Date: June 11, 1985.

APPENDIX

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1982

STATE OF MONTANA, APPELLANT

v.

WILLIAM P. CLARK, Secretary of the Department of the Interior, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 82-02421)

Argued September 25, 1984

Decided November 20, 1984

A. Raymond Randolph, with whom *Christopher L. Varner* was on the brief, for appellant.

Edward J. Shawaker, Attorney, Department of Justice, with whom *Robert C. Klarquist*, Attorney, Department of Justice, was on the brief, for federal appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Dale T. White, with whom *Robert S. Pelcyger* was on the brief, for appellee Crow Tribe of Indians. *Martin E. Seneca, Jr.* entered an appearance for the Crow Tribe of Indians.

Before WRIGHT and WALD, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: The State of Montana appeals a District Court order upholding an Interior Department regulation, 30 C.F.R. § 872.11(b)(3) (1983), against a challenge that it is inconsistent with the organic statute, the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (1982). The Crow Tribe of Indians joins the federal government in defending the validity of the regulation. In addition to this substantive issue, the case presents the threshold procedural question whether Montana's petition for judicial review of the regulation was timely. We hold that Montana's petition for review satisfied the Act's 60-day filing requirement, *id.* § 1276(1), and is properly before this court. On the merits, we agree with the District Court and find the challenged regulation a reasonable construction of the Act.

I. BACKGROUND

A. *General Provisions of the Act*

As its title indicates, the Surface Mining Control and Reclamation Act is designed to meet two related concerns. First, Congress wished to regulate current and future strip mining operations to "protect society and the environment from the adverse effect of surface coal mining operations." 30 U.S.C. § 1202(a). Toward this end, Subchapter V, *id.* §§ 1251-1279, requires the Office of Surface Mining (OSM) to promulgate interim federal standards and provides that a state may take over the

regulatory process by submitting a program that meets the approval of the Secretary of the Interior. *See generally In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1350-1352 (D.C. Cir. 1980). Second, Congress sought to provide for reclamation of land and water resources in mining areas abandoned prior to the Act's enactment on August 3, 1977. *Id.* § 1202(h). Subchapter IV, *id.* §§ 1231-1243, sets up a reclamation fund to be held in trust by the Secretary of the Interior. *Id.* § 1231 (a). Fees exacted from current operators of strip mining projects are pooled into the trust, which the Secretary is to distribute to any state or Indian tribe that has submitted an approved "abandoned mine reclamation program." *Id.* §§ 1232(a) & 1235(k). Upon approval of such a program OSM must allocate funds to the state or tribe in a manner that "reflect[s] both the area from which the revenue was derived as well as the national program needs for the funds." *Id.* § 1232(g)(1). In particular, Section 1232(g)(2) states that 50 percent of the funds "collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation."

Nominally, at least, the Act draws a distinction between the role given to Indian tribes in the *regulation* of current mining operations and that allotted to them in the *reclamation* of abandoned mines. Subchapter V gives Indians no direct role in regulating current or prospective mining operations on Indian lands. Believing the jurisdictional status of those areas too unclear to permit effective allocation of the regulatory function, Congress directed the Secretary to submit a report within six months of the enactment of the Act on August 3, 1977 and propose "legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." *Id.* § 1300(a)-(h).[1]

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[1] OSM commissioned a lengthy study on the subject of surface mining on Indian lands. COUNCIL OF ENERGY RESOURCE

See H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975). In the interim Congress decided to protect Indian lands from the potential ravages of surface mining through federal performance standards rather than state oversight. *Id.*

Indians are, however, given some role in reclamation of abandoned mines on Indian territory. In the final conference session, and virtually without discussion, House and Senate conferees added Section 1235(k), which reads: "Indian tribes having within their jurisdiction eligible lands [as defined in § 1234] * * * shall be considered a 'State' for the purposes of [Subchapter IV]." *See* H.R. Rep. 95-493, 95th Cong., 1st Sess. 99 (1977). Thus Indian tribes, though denied any participation in the *regulation* of current mining operations, may submit *reclamation* plans and, if approved by the Secretary, administer the funds earmarked for this purpose. Under current OSM policy, however, the practical import of permitting tribes to submit reclamation plans is minimal. Reading the Act to prohibit assignment of reclamation authority to an entity statutorily incapable of exercising full regulatory authority, the Secretary will not approve reclamation plans submitted by a tribe until Congress has clarified the status of Indian lands under the Act. *See* Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment at 13-14, *reproduced in* Appendix (App.) at 119-120; 47 Fed.

TRIBES, THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS (1979). It was completed in 1979 and, presumably, submitted to the Congress in accord with 30 U.S.C. § 1300(a). Over seven years have now passed since the Act was signed into law, and Congress has yet to enact the promised legislation clarifying the administrative status of Indian lands. In the 98th Congress the Senate Committee on Indian Affairs held hearings on S. 2879, a bill that would directly address the current controversy. But the bill had not been reported out of committee by the time the Congress adjourned *sine die* on October 12, 1984.

Reg. 28580 (1982).[2] Approval by the Secretary is a prerequisite to any distribution of funds. 30 U.S.C. § 1235.

B. *The Present Controversy*

This case requires us to review an OSM regulation promulgated to implement Section 1232(g)(2), the provision of Subchapter IV that sets out the allocation formula for distribution of the Abandoned Mine Reclamation Fund to eligible parties. That section mandates that 50 percent of the funds collected "in any State or *Indian reservation* shall be allocated to that State or *Indian reservation*" pursuant to an approved reclamation program. (Emphasis added.) The Act does not define "Indian reservation." It does, however, define "*Indian lands*" as "all lands * * * within the exterior boundaries of any Federal Indian reservation * * * and all lands including mineral interests held in trust for or supervised by an Indian tribe." Section 1291(9).

In order to implement Section 1232(g)(2), in 1978 the Interior Department issued 30 C.F.R. § 872.11(b)(3) after notice and comment. The regulation, which was reenacted in identical form in 1982, largely tracked the language of Section 1232(g) but substituted "Indian lands" for "Indian reservation."[3] Thus under the regu-

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[2] The Secretary's approach apparently stems from an interpretation of 30 U.S.C. § 1235(b) & (h). As discussed in text *infra*, the relationships among §§ 1235(b), (h) & (k), 1273(a), and 1300(a) are extremely obscure. The parties do not raise and we do not reach the question whether the policy of postponing distribution of funds collected on non-reservation Indian lands is consistent with or required by the Act. We note, however, that in upholding 30 C.F.R. § 872.11(b)(3) we have examined that regulation in light of OSM's policy to suspend distribution pending congressional clarification.

[3] 30 C.F.R. § 872.11(b)(3) reads in pertinent part:

> An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian

lation fees collected from mines beneficially owned by or for Indians, but outside their reservation, would go to the tribe rather than to the state, provided the Secretary approves its reclamation plan. The State of Montana challenges the regulation as "not in accordance with law." 5 U.S.C. § 706(2)(a) (1982). The Secretary of the Interior and the Crow Tribe of Indians maintain that the regulation is a reasonable construction of the Act.

At stake in the case is the right to administer approximately $700,000 [4] a year collected from surface mining operations in a 1.13-million-acre tract in Montana known as the "ceded strip." Under a 1904 treaty the Crow Tribe ceded the strip to the United States, but retained a beneficial interest in the substantial coal deposits in the area. *See* 33 U.S.C. § 357 (1982). Thus, though not within the "exterior boundaries of any Federal Indian reservation," 30 U.S.C. § 1291(9), all parties agree that the ceded strip qualifies as "Indian land" as defined by the statute.[5] *Id.* Accordingly, substitution of the phrase

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tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. * * *

[4] Brief for appellee Crow Tribe of Indians at 36 nn.13-14, *citing* Keystone Coal Industry Manual, G. Nielson ed., McGraw Hill, N.Y., N.Y., 1978 Annual Volume at 966-967; 1979 Volume at 998-999; 1980 Volume at 903-904; 181 Volume at 1076-1078; 1982 Volume at 1126-1128. During each of the years since 1978 the State of Montana has received approximately $5,000,000 in reclamation funds. *Id.*

[5] The Crow Tribe also argues that the ceded strip is a "reservation" within the meaning of the Act. *Cf. Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1982) (ceded strip not considered part of reservation for purposes of criminal jurisdiction); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981) (discussing possible limitations on state's power to tax proceeds from coal mined on ceded strip), *cert. denied*, 459 U.S. 916 (1982). Given our resolution of the statutory question, we need not decide whether the ceded strip qualifies as a reservation under 30 U.S.C. § 1232(g)(2).

"Indian lands" for the statutory language "Indian reservation" has the effect of authorizing the Crow Tribe, rather than the State of Montana, to apply for the funds collected on the ceded strip. We note again that, although the challenged regulation has the effect of depriving Montana of funds derived from the ceded strip, it does *not* actually authorize any distribution to the Crow Tribe. Instead, under OSM's current interpretation of the statute, monies collected from the ceded strip are held in escrow pending congressional clarification of regulatory jurisdiction over Indian lands.[6]

II. The Timeliness of the Petition for Judicial Review

If, as the federal appellees argue and the District Court found, Montana's petition for review was not timely, we need not face the statutory question at all. We conclude, however, that the Act's 60-day period for judicial review ran from June 30, 1982, the date of the challenged regulation's republication, and not from October 25, 1978, the date of its original promulgation. Under controlling principles of administrative law, Montana's petition for judicial review, filed 58 days after the regulation's reissuance, was properly before the District Court.

Section 1276(a)(1) of the Act requires that petitions for review of regulations promulgated by the Secretary of the Interior be filed within 60 days of issuance of the regulations. The Secretary initially issued the challenged regulation on October 25, 1978. 43 Fed. Reg. 49940, 30 C.F.R. Part 872. Montana does not dispute that, although it had notice of the regulation and full opportunity to challenge it at that time, it elected not to do so. On De-

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[6] At the end of three years any funds not distributed pursuant to 30 U.S.C. § 1232(g)(2) "shall be available for expenditure in any eligible area as determined by the Secretary." *Id.*

cember 11, 1981 OSM published "proposed rules" in the Federal Register and solicited comments from the public. 46 Fed. Reg. 60778. One of those rules, the regulation at issue in this case, was identical to that published in 1978. *Id.* at 60781. Apparently, the Secretary's primary motivation for initiating rulemaking procedures was to determine whether the OSM regulations complied with Executive Order 12291, which mandates a weighing of the costs and benefits of agency regulations. 47 Fed. Reg. 28574 (1982).

But in "seeking early and meaningful public participation," the Secretary did not limit comments to consideration of the burdensomeness of the regulations. 46 Fed. Reg. 60779 (1981). Indeed, with reference to 872.11(b)(3) he took the opportunity expressly to explain the substitution of "Indian lands" for the statutory language "Indian reservation." *Id.* at 60782. Two states, Montana and New Mexico, submitted comments objecting to 872.11(b)(3). On June 30, 1982 the agency announced final rules designed to "clarify the relationships and responsibilities of the States, Indian tribes, and Federal Government in implementing" the surface mining regulatory program. 47 Fed. Reg. 28574 (1982). The agency expressly considered, responded to, and rejected Montana's comments. *Id.* at 28580, 28592. Fifty-eight days later Montana filed this petition for judicial review of the final rules.

The law in this circuit is clear that an agency decision not to amend longstanding rules after a notice and comment period is reviewable agency action.[7] *See, e.g., Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983). Although acknowledging the general reviewability of a decision not to amend, the District Court believed that *Natural Re-*

[7] The Administrative Procedure Act, 5 U.S.C. § 551(5) (1982), defines "rule making" as the "agency process for formulating, *amending*, or repealing a rule." (Emphasis added).

sources Defense Council v. NRC (*NRDC*), 666 F.2d 595 (D.C. Cir. 1981), carved from this rule a broad exception for all petitioners who had failed to exercise a prior opportunity to seek judicial review. The rule of *NRDC*, however, does not cut so deeply into the general principle that all final agency action is presumptively reviewable. *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979). *NRDC* merely holds that a protestant, who could have but did not seek review, may not create the basis for a reviewable order by unilaterally petitioning for repeal or amendment of a regulation.[8] To permit any complainant to restart the limitations period by petitioning for review of a rule, the *NRDC* court recognized, would eviscerate the congressional concern for finality embodied in time limitations on review.

This concern is not present in the instant case. Montana did not contrive to restart the 60-day period by unilaterally seeking repeal of a long-standing regulation. Indisputably, the agency itself initiated rulemaking procedures in 1981. It held out Section 872.11(b)(3) as a proposed regulation, offered an explanation for its language, solicited comments on its substance, and responded to the comments in promulgating the regulation in its final form. Given the affirmative indications that the agency evaluated the entire substance of the regulation, it matters little whether the agency's primary focus was on bringing the comprehensive regulatory scheme in compliance with Executive Order 12291. Unless we are to consider the notice and comment process a meaningless gesture, the order of June 1982 reissuing Section 872.11(b)(3) constitutes final agency action and is reviewable under the Administrative Procedure Act, 5

[8] Moreover, the court in *NRDC* explicitly acknowledged that where, as here, the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review. 666 F.2d at 602. *See also Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

U.S.C. § 704. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). The 60-day period for review began on June 30, 1982 and, accordingly, the petition was timely.

III. The Statutory Question

A. *Standard of Review*

This case requires us to reconcile two superficially conflicting principles of statutory interpretation. Montana raises a pure question of law, whether the challenged regulation is inconsistent with the organic statute. Accordingly, it invokes the principle that the judiciary is uniquely responsible for the final determination of the meaning of statutes. *FTC v. Colgate Pamolive Co.*, 380 U.S. 374, 385 (1965). The federal appellees, on the other hand, acknowledge the purely legal nature of the question but insist that this court should afford substantial deference to the Department of the Interior's construction of a statute it is entrusted to administer. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, —— U.S. ——, —— & n.14, 104 S.Ct. 2778, 2782 & n.14 (1984) (hereinafter cited as *Chevron* only to 104 S.Ct.) (collecting cases).

The conflict between these two principles, both thoroughly entrenched in the case law, *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1287 (D.C. Cir. 1984), is more apparent than real. Beyond question, it is the unique province of the judiciary to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). But the exercise of this function does not preclude affording deference to an agency's construction of its enabling statute. For, properly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983); *Trailways*,

Inc. v. ICC, supra, 727 F.2d at 1288. Thus the court exercises its constitutionally prescribed function as the final arbiter of questions of law when it evaluates the breadth of congressional delegation and, in so doing, determines the degree of deference warranted in the particular controversy before it.

The recent decision in *Chevron, supra*, elaborates on these principles and sets out the appropriate methodology for ascertaining whether to afford deference to an agency construction of its governing statute. At the outset, "if the intent of Congress is clear, that is the end of the matter," and contrary agency interpretations must be invalidated. 104 S.Ct. at 2781. To conclude otherwise would be to adopt the absurd position that Congress delegated authority to vitiate or disregard its intent.

Isolating the intent of Congress, of course, is often easier said than done. Thus it has become axiomatic that we must assume that Congress expresses its intent through the ordinary meaning of the words it uses. *Rubin v. United States*, 449 U.S. 424, 430 (1981); *North Dakota v. United States*, 460 U.S. 300, 312 (1983). But the language of a statute is not an inevitable proxy for legislative intent. *Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981); *Water Transport Ass'n v. ICC*, 715 F.2d 581, 593 (D.C. Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 998 (1984). If the language of one statutory phrase, however "plain," collides with the literal command of another or of the statute as a whole, the resulting ambiguity necessitates examination of extrinsic evidence of legislative intent to reconcile the conflict. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403-405 (1975). Similarly, if the "plain" language would lead to a patently "absurd" result, the assumption that the literal words embody legislative intent has considerably less force. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

If examination of the statutory language and, where appropriate, extrinsic evidence reveals that "Congress has not directly addressed the precise question at issue," the court's task is to determine whether to afford deference to an agency's effort to explicate the ambiguous language or fill the statutory void. *Chevron, supra*, 104 S.Ct. at 2782. The cases divide into two categories, roughly paralleling the sometimes fuzzy distinction between legislative and interpretive rules. First, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute * * *." *Id. See also Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In this context we are directed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), as well as the Supreme Court, *Chevron, supra*, 104 S.Ct. at 2782, to affirm the agency's construction unless arbitrary, capricious, or manifestly contrary to law. Second, if "the legislative delegation to an agency * * * is implicit rather than explicit," *Chevron* commands that the court affirm an agency's interpretation of a statute it is entrusted to administer provided that it is "reasonable." *Id. See also Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). Deference in this context, no less than in the case of explicit delegation, reflects the deep institutional premise that it is for the agency in its capacity as delegate of the legislative branch, not the court, to make policy within the boundaries assigned to it by Congress. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1979).

Applying these principles to the case at hand, we evaluate first whether the statutory language of Section 1235(g)(2) reflects a congressional intent that fees collected from mines on Indian lands outside the exterior boundaries of reservations be distributed to states rather than the tribe.[9] The literal words of the statute are

[9] We recognize that Montana has elected to challenge 30 C.F.R. § 872.11(b)(3), which allocates funds to Indian tribes,

presumptively conclusive of legislative intent, but that presumption may be defeated by contrary indications of intent also evident on the face of the statute. In that event, examination of extrinsic evidence to ascertain the congressional purpose would be necessary.

If we determine that Congress did not expressly foreclose the construction embodied in the challenged regulation, we must determine whether the agency's construction warrants deference by measuring the breadth of delegation, if any, to the agency to fill gaps or resolve statutory ambiguities and by determining whether the agency's interpretation fell within the boundaries assigned to it.[10] On the one hand, as Montana correctly notes, the absence of several of the typical indicia of broad congressional delegation to the agency counsels against deference. *Trailways, Inc. v. ICC*, *supra*, 727 F.2d at 1288. In particular, the construction embodied in 30 C.F.R. § 877.11(b)(3) required no technical or specialized expertise, a circumstance ordinarily weighing against deference.[11] *Alexander v. FERC*, 609 F.2d 543,

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rather than § 872.11(b)(2), which allocates funds to states. Montana makes clear, however, that its objection to § 872.11(b)(3) is that it has the effect of "depriv[ing] the State of Montana and its citizens of funds needed to reclaim lands and water spoiled by coal mining." Brief for appellant at 22. Indeed, were this not the basis of its complaint, we doubt the State would have standing to mount this challenge at all. *See* text at p. 18 *infra*. Thus the critical inquiry is not only whether Congress intended that tribes be allocated funds generated by non-reservation Indian lands, but also whether it intended that states be allocated such funds.

[10] *See, e.g., Western Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th Cir. 1982) (in reviewing agency's construction of its governing statute court must determine whether agency has transgressed bounds fixed by Congress), *cert. denied*, —— U.S. ——, 104 S.Ct. 2160 (1984).

[11] *See also Trailways, Inc. v. ICC*, 727 F.2d 1284, 1288 (D.C. Cir. 1984) (established administrative practice when the statute was enacted is an indicium of delegation).

548 (D.C. Cir. 1979). Similarly, the statutory language at the center of this controversy is not "of such inherent imprecision * * * that a discretion of almost legislative scope was necessarily contemplated." *Associated Data Processing Service Organizations, Inc. v. Board of Gov. of FRS*, —— F.2d ——, —— (D.C. Cir. No. 82-1910, decided Oct. 2, 1984) (slip op. at 37).

On the other hand, one consideration weighs decisively in favor of deference. As will be developed more fully below, Congress expressly recognized that the jurisdictional status of Indian lands was too uncertain to permit effective allocation of regulatory authority for those regions. 30 U.S.C. §§ 1273, 1300. *See also* H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1974). Accordingly, it provided that, within a matter of months, it would return to the legislative task and clarify the question. Over seven years have now passed and the promise of congressional clarification remains unfulfilled. In the meantime, the Secretary is under a present obligation to collect fees for and administer the reclamation fund. Given this rather remarkably mixed message, we can only conclude that, pending congressional clarification, Congress afforded the Secretary substantial discretion in the administration of the fund on Indian lands. Thus deference is appropriate, and we will uphold the agency's interpretation provided only that it is not expressly foreclosed by congressional intent and that it is reasonable. *Chevron, supra*, 104 S.Ct. at 2782.

B. *The Plain Language*

Montana maintains that the plain meaning of the statute is controlling. It points out that Congress used the phrase "Indian reservation" throughout Subchapter IV, *see, e.g.*, 30 U.S.C. § 1239(b-c), and that Congress clearly knew the difference between the phrase "Indian reservation" and the statutorily defined term "Indian lands," which includes both reservations and lands beyond

the exterior boundaries of reservations either owned by or beneficially held for an Indian tribe. *See, e.g., id.* §§ 1273(9) & 1300(h). Montana also finds relevant Section 1273, which specifically states that, except as provided in Section 1300, the provision that commissions a study on the question, the Act "shall not be applicable to Indian lands." Thus, in its view, the only ambiguity in the statute was injected by the Secretary when he substituted "Indian lands" for "Indian reservation" in the challenged regulation.[12]

There can be no denying the initial appeal of Montana's "plain meaning" argument. Ultimately, however, we are not persuaded. The fundamental, and in the end fatal, deficiency in Montana's reading of the statute is its failure to acknowledge, much less account for, language that equally plainly compels the conclusion that Congress did not intend that funds derived from Indian lands be distributed to the states.

Montana makes clear that the gravamen of its complaint is that the regulation deprives the State of funds needed to reclaim lands and water spoiled by coal mining. Brief for appellant at 22. The State also asserts that it

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[12] Montana also suggests that the recent decision in *Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians*, —— U.S. ——, 104 S.Ct. 2105 (1984), is "directly on point." Supplemental brief for appellant at 2. We disagree. The statutory language at issue in *Escondido* was, no doubt, similar to that at issue in this case. Far more importantly, however, *Escondido* arose under an entirely different statute, the Federal Power Act, 16 U.S.C. § 797(e). Our task is to determine Congress' intent under the Surface Mining Control and Reclamation Act of 1977. Unless the language of the Federal Power Act somehow informs this inquiry, it is of no relevance at all. Given the wholly different objectives and structure of the two Acts, and the absence of any evidence whatever that the 95th Congress was in any way influenced by the Federal Power Act, we find the language and subsequent judicial construction of that Act irrelevant to the interpretive task before us in this case.

intends to use the funds to reclaim abandoned mines on non-reservation Indian lands[13] *Id.* at 25. Yet the Act unambiguously denies the state the power to administer funds on any Indian lands, on or off the reservation. No state is eligible for funds under Section 1232(g)(2) until it has submitted, and the Secretary has approved, a "State reclamation program." *Id.* § 1232(c). The Act defines "State program" to mean "a program established by a State * * * to regulate * * * reclamation operations on *lands within such State.*" *Id.* § 1291(25) (emphasis added). And, finally, the Act defines "lands within such State" to mean "all lands within a State other than Federal lands and Indian lands." *Id.* § 1291(11). Because "Indian lands" include "mineral interests held in trust for * * * an Indian tribe." *id.* § 1291(9), the Act explicitly denies Montana the power to administer federal funds to reclaim abandoned mines on the cede strip. Thus granting Montana the funds generated by current mining operations on the ceded strip would violate the clear command of Section 1232(g)(1) that "[t]he geographic allocation of expenditures from the fund shall reflect * * * the area from which the revenue was derived."[14]

Another "plain language" obstacle that Montana fails to confront, much less surmount, is the directive of Section 1235(k) that "Indian tribes having within their jurisdiction eligible lands pursuant to section 1234 of this title or from which coal is produced, shall be considered as a 'State' for the purposes of this subchapter." Once this provision is read back into Section 1232(g)(2),

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[13] This assertion is implicit in Montana's policy argument that "it makes good sense" for states to undertake reclamation projects when non-Indians control the surface. Brief for appellant at 25. As discussed below, *see* note 22 *infra* and accompanying text, this alleged policy finds no support in the legislative history.

[14] *See also* 30 U.S.C. § 1235(e) (to be approved a state reclamation plan must identify the areas to be reclaimed and the legal authority to perform such work).

also in Subchapter IV, the supposedly plain meaning of that provision's allocation language becomes anything but clear. Section 1232(g)(2) provides, with emphasis added, that 50 percent of the "funds collected annually in any *State* or Indian reservation shall be allocated to that *State* or Indian reservation." But Section 1235(k) requires that the Secretary treat as a "state" any tribe having jurisdiction over lands that produce coal. Thus, assuming that the Crow Tribe has "jurisdiction" over the ceded strip within the meaning of Section 1235(k),[15] 50 percent of the funds derived from the region go to it, and not Montana, a result entirely consonant with the challenged regulation.[16]

Finally, Montana's reliance on Section 1273 to "plainly" support its position fails to convince. Section 1273(a) states that "the provisions of this chapter shall not be applicable to Indian lands [except in accord with Section 1300]." This provision, of course, directly conflicts with Section 1235(k), which treats tribes having jurisdiction over coal-producing lands as states for purposes of Sub-

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[15] The Crow Tribe maintains that the State clearly is without jurisdiction to oversee reclamation projects on Indian lands. Brief for appellee Crow Tribe of Indians. The State of Montana, on the other hand, has little doubt that it does have jurisdiction, at least over off-reservation Indian lands. Brief for appellant at 25. Whether the Crow Tribe or the State has administrative jurisdiction over regions like the ceded strip, of course, is not clear. Precisely this uncertainty compelled Congress to postpone final resolution of the locus of regulatory authority in Indian lands. *See* 30 U.S.C. § 1300(h); H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975).

[16] We acknowledge that using § 1235(k) to expand the definition of "state" in § 1232(g)(2) instead of simply using the phrase "Indian lands" rather than "Indian reservation" constitutes peculiar drafting. Accordingly we do not give the literal command of § 1235(k) dispositive force. We note only that the "plain" meaning of the statute leads us down contradictory and mutually exclusive paths, a result that justifies our looking beyond the four corners of the Act to determine the intent of Congress.

EDITOR'S NOTE

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chapter IV.[17] More importantly, Section 1273(a) defeats Montana's right to the funds collected on the ceded strip as much as it defeats that of the tribe. Somewhat surprisingly, Montana has elected to challenge 30 C.F.R. § 872.11(b)(3), which allocates funds from Indian lands to the tribes, rather than 30 C.F.R. § 872.11(b)(2), which exempts from funds allocated to the states fees collected from "Indian lands."[18] At bottom, however, as Montana admits, brief for appellant at 24, its complaint stems from its belief that it, not the Crow Tribe, is entitled to funds collected on the ceded strip. Indeed, were this not the injury that motivates the petition for review, we doubt Montana would have standing to challenge Section 872.11(b)(3) at all. But if the essence of Montana's complaint is its view that the Act confers on it a right to funds generated by the ceded strip, Section 1273 stands "plainly" and squarely in its path. For the literal

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[17] The legislative history illuminates the source of this inconsistency. Throughout most of the Act's history Congress assumed that Indian tribes would have no direct role in either reclamation or regulation. The predecessors of §§ 1273(a) and 1300 were present in the bills passed by both the 93rd and 94th Congresses as well as in the bill that ultimately was enacted. The provision that was to become § 1235(k), on the other hand, was added in the final conference session on the bill before it was passed by the 95th Congress. Thus it appears that at the last moment Congress elected to give tribes a direct role in overseeing *reclamation* programs but failed to alter those provisions, such as § 1273, that assumed that tribes were to be entirely without administrative authority.

[18] 30 C.F.R. § 872.11(b)(2) reads in pertinent part:

> An amount equal to 50 percent of the reclamation fees collected from within a State shall be allocated at the end of the fiscal year in which they are collected for use in that State under an approved State Reclamation Plan. Reclamation fees collected from Indian lands shall not be included in the calculation to be allocated to a State. * * *

30 C.F.R. § 872.11(b)(3), which allocates funds derived from Indian lands to the Indian tribe having an interest in those lands, is quoted in note 3 *supra*.

terms of that section say that the Act "is not applicable" to Indian lands at all. If that is the case, no more than the Crow Tribe does Montana have a present right to funds derived from mining operations either inside Indian reservations or beyond their exterior boundaries. 30 U.S.C. § 1272(11).

In short, Montana's focus on the "plain meaning" of the term "Indian reservation" in Section 1232(g) is far too narrow. The equally plain but conflicting command of other terms of the statute, though not independently dispositive, is more than sufficient to defeat even the strong presumption that the words of the statute, without more, embody Congress' intent. Indeed, the ambiguities present on the face of the statute make an examination of the legislative history for evidence of that intent both necessary and appropriate.

C. *The Legislative History*

We are frank in admitting that our extensive review of the labyrinthine legislative history has yielded few certain conclusions. The long and convoluted path toward final enactment of the Act began in 1968. Hearings on S. 3132, S. 3126, and S. 217 Before Senate Committee on Interior and Insular Affairs, 90th Cong., 1st Sess. (1968). The 93rd Congress passed an earlier version of the bill in 1974, S. 425, 93d Cong., 2d Sess. (1974), but President Ford vetoed it. The 94th Congress passed a similar bill in 1975, H.R. 25, 94th Cong., 1st Sess. (1975), but it too met with a presidential veto. The legislation as it now stands was enacted by the 95th Congress and signed into law by President Carter in 1977. Each Congress made revisions in the earlier draft, but often carried over language that the subsequent changes made obsolete or internally inconsistent. Especially obscure is the relationship between Sections 1232(g), 1273(a), 1235(k) and 1300(a-h).

From this tangled skein, however, one aspect of the congressional purpose emerges with clarity. Believing that the jurisdictional status of non-reservation "Indian lands" was too unclear to permit effective allocation of regulatory authority in these regions,[19] Congress expressly postponed resolution of the question and directed that the Secretary of the Interior submit a report within six months of the enactment of the Act and "propose[] legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." 30 U.S.C. § 1300(a). No evidence supports Montana's view that the language of Section 1232 (g)(2) reflects a finely calibrated intent to permit states to reclaim non-reservation Indian lands pending congressional clarification, while limiting tribal jurisdiction to reservations. Nor does the legislative history support Montana's assertion that Congress intended that non-Indians reclaim the surface in regions where a tribe controls the subsurface minerals. In sum, we find 30 C.F.R. § 872.11(b)(3), read in conjunction with the Secretary's policy to suspend distribution of funds collected on non-reservation Indian lands, far more consonant with congressional objectives than the position asserted by Montana.

1. *The Indian lands question in the 93rd, 94th, and 95th Congresses.* In the 93rd Congress the bill that emerged from the House Committee on Interior and Insular Affairs would have given Indians full administrative authority over both reclamation and regulation of mines on "Indian lands." H.R. 11500, 93rd Cong., 2d Sess. §§ 301-311 (1974). The allocation language of current Section 1232(g) was not in the bill. But the House's clear intent was to treat Indian tribes as states and to designate Indian lands, even those off the reservation, *id.* § 705(8), under the regulatory authority of the tribes

[19] *See, e.g.*, H.R. Rep. 94-189, 94th Cong., 1st Sess. (1974).

that controlled them. H.R. Rep. 93-1072, 93d Cong., 2d Sess. 115-116 (1974).

The Senate took a different approach. *See* S. 425, 93d Cong., 2d Sess. §§ 115-116 (1973). Section 217(a) of the bill passed by the Senate stated that, except as provided in Section 403, "the provisions of this Act shall not be applicable to Indian lands." Section 403, the progenitor of Section 1300 in the current Act, commissioned the Secretary of the Interior to produce and submit to Congress a study on regulatory authority over Indian lands. The Senate Report, S. Rep. 93-402, 93d Cong., 1st Sess. (1973) (hereinafter cited as *Senate Report*), makes explicit the intent to "exempt temporarily all Indian lands from the Act," *id.* at 74, including lands controlled by a tribe but beyond the boundaries of its reservation. S. 425, 93d Cong., 1st Sess. § 510(9) (1973). The Senate bill provided that the federal government, not the states, would oversee surface mining on Indian lands pending congressional clarification of the question. The Senate bill was far clearer about the mechanisms for interim federal control of regulation than of reclamation. *See, e.g., Senate Report* at 74. But there is no doubt that the Senate envisioned no role for the states on Indian lands. To be eligible to receive reclamation funds a state must have jurisdiction over "lands within such state," S. 425, 93d Cong., 2d Sess. § 204(1) (1973), a phrase defined to "insure that the States, through their State programs, will not assert any additional authority over * * * Indian lands." *Senate Report* at 75.

In conference the conferees largely acceded to the Senate's approach to Indian regulatory authority. *See* H.R. Rep. 93-1522, 93d Cong., 2d Sess. (1974) (hereinafter *Conference Report*). The bill that emerged from conference gave Indians no authority to submit plans for either regulation or reclamation, and, like the original Senate bill, commissioned a study to investigate the subject of administrative jurisdiction over Indian lands. The

study was to include proposed legislation that would "allow Indian tribes to elect to assume full regulatory authority over the * * * regulation of surface mining of coal on Indian lands." *Id.* at 68 (§ 712(a)).

The extent of state jurisdiction over non-reservation Indian lands was slightly less clear in the bill as it emerged from conference and later passed by both Houses than in the original Senate bill. The defined term "lands within such state," which in S. 425 had explicitly excluded all Indian land from the ambit of a state reclamation program, was dropped; *compare* S. 425, 93d Cong., 1st Sess. § 204 (1973), *with Conference Report* at 20 (§ 503); and the language allocating 50 percent of the fees derived from an Indian reservation or a state to that reservation or state was added. *Id.* at 12 (§ 401(e)). One could plausibly draw from these changes the inference that the conferees, though wishing ultimately to give tribes regulatory authority over non-reservation Indian lands, *id.* at 68 (§ 712(a)), provided in the interim that states could administer reclamation plans on the off-reservation portions of those lands as long as the fees derived from reservations proper return to the reservation.

For several reasons this inference is unconvincing. The conferees could not have been clearer that ultimately they wanted Indians to administer funds on non-reservation Indian lands, *id.*; and not a whit of evidence suggests an intent that the states oversee the funds in the interim period. Indeed, though Section 401(e), unlike the bill in final form,[20] speaks only generally about the administrative vehicles through which the 50 percent allocation would be implemented, a state could only have direct control of the funds if it had submitted an approved state reclamation program. The bill passed by the 93rd Congress, no less than either the original Senate or House bills, limited the jurisdiction of state programs to lands other

[20] *Compare* 30 U.S.C. § 1232(g)(2) *with Conference Report* at 12 (§ 401(e)).

than "Federal lands" and "Indian lands" both on and off the reservation. *Id.* at 60-61 (§ 701(7), (8), (9), & (11)). Thus no evidence supports the contention that the 93rd Congress intended that the states oversee reclamation on non-reservation Indian lands or otherwise benefit from funds collected in such areas during the interim period prior to enactment of clarifying legislation.

The history of the legislation during the 94th Congress confirms this view. The Indian lands provisions were carried over essentially without change from the 93rd Congress. The Conference Report, H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975), makes clear that, pending enactment of legislation giving direct regulatory jurisdiction to the tribes, the combination of federal performance standards and tribal leasing authority would protect Indian lands from the potentially destructive effects of surface mining. The focus of the Conference Report was on regulation and not reclamation. But, given their recognition of the "special jurisdictional problems associated with lands held in trust for Indian tribes," *id.*, the conferees clearly intended that the states be given no role at all in the administration of reclamation programs on non-reservation Indian lands.

In the 95th Congress the surface mining bill came out of the appropriate Senate and House Committees in a form virtually identical to the bills passed by the 93rd and 94th Congresses but vetoed by President Ford. *See* S. Rep. 95-128, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-218, 95th Cong., 1st Sess. (1977). On the Senate floor, however, Senator Abourezk introduced an amendment to the Senate bill that would have given Indian tribes the option of assuming full regulatory and reclamation authority over all Indian lands. 123 Cong. Rec. 15606-15607 (1977). The amendment, which was passed without opposition or serious debate, was similar to the approach adopted, but later abandoned, by the House during the 93rd Congress. This time, however, the roles were reversed. In conference the House's current view that leg-

islation concerning Indian lands should be postponed pending completion of a study prevailed, and the Abourezk amendment was deleted. However, entirely without explanation or comment—either in conference or later on the floor of either house—the conferees added Section 1235(k), which for purposes of reclamation (but not regulation) treated Indian tribes like states. Thus, to the extent the 95th Congress altered the status of Indians under the Act at all, the change was in the direction of expanding their role in reclamation of abandoned mines on coal-producing lands within their jurisdiction. As in the 93rd and 94th Congresses, at no time did the 95th Congress evince an intent to afford states reclamation authority on non-reservation Indian lands. Indeed, once again the conferees made clear that their uncertainty about the jurisdictional status of those lands justified postponing legislation until a study on the question had been completed. H.R. Rep. 95-493, 95th Cong., 1st Sess. 114 (1977).

In sum, examination of the 95th Congress' deliberations, no more than those of earlier Congresses, yields not even a hint that the choice of the phrase "Indian reservation" in Section 1232(g)(2) reflected a conscious decision to treat on- and off-reservation lands differently. Indeed, indiscriminate use of the phrases "Indian lands" and "Indian reservations" throughout the long history of the Act suggests an inadvertent drafting inconsistency far more than a deliberate policy choice. *See, e.g.*, S. Rep. 95-128, 95th Cong., 1st Sess. 67 (1977) ("Fifty percent of the revenues derived from * * * *lands of an Indian tribe* are to be returned to that * * * Indian tribe." (emphasis added)).[21] Nor is there any support at all for Montana's assertion that Section 1232(g)(2) embodies a congressional determination that "it makes good sense"

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[21] *See also* S. Rep. 95-128, 95th Cong., 1st Sess. 113 (1977) (letter of Secretary of the Interior Cecil Andrus); 121 Cong. Rec. 13377 (1975) (comments of Senator Melcher).

for non-Indians to oversee reclamation of lands the subsurface of which is beneficially owned by or for Indians. Brief for appellant at 25.[22] Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest.

2. *Congressional objectives and the challenged regulation.* Measured against Congress' clear objective to postpone resolution of the administrative status of Indian lands, we find the Secretary's construction of the Act far more convincing than that advanced by Montana. Montana asserts, albeit indirectly, that it has a present right to funds collected on the ceded strip. But, given Congress' clear intent to deprive states of reclamation authority over non-reservation Indian lands, we find it inconceivable that Congress wished states to benefit from funds derived from those areas. The bill passed by the 93rd Congress, like those passed by the 94th and 95th

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[22] Indeed, both the language and the history of the Act imply that Congress did envision that Indians exercise regulatory authority even in those regions in which their interest extends only to the subsurface. The House bill in the 93rd Congress and the Senate bill in the 95th Congress clearly would have given Indians jurisdiction over lands both within and without the exterior boundaries of the reservation. Moreover, in § 1300 of the Act Congress commissioned the Secretary of the Interior to submit proposed legislation "designed to allow Indian tribes to elect to assume full regulatory authority [defined to include both regulation and reclamation (30 U.S.C. § 1291(22) & (24))] over * * * surface mining on Indian lands [defined to include non-reservation land, *id.* § 1291(9)]." Whether the policy urged by Montana is a sound one or even permissible can be debated. In statutory construction, however, "questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-221 (1980).

Congresses and finally signed into law in 1977, makes explicit the link between administrative jurisdiction and the right to funds. Throughout the Act's evolution it directed that the funds "reflect * * * the area from which the revenue was derived * * *." *Compare* 30 U.S.C. § 1232(g)(1), S. 425, 93d Cong., 1st Sess. § 401(e) (1974), *and* H.R. 25, 94th Cong., 1st Sess. § 401(e) (1975). The link is especially clear in the final form of the Act. Section 1232(e) directs that a state reclamation plan must "identify the areas to be reclaimed" and the "legal authority" to undertake reclamation operations.[23]

In contrast, the Secretary's decision to award funds derived from non-reservation Indian lands to the tribes, but to condition actual distribution on the enactment of clarifying legislation, is fully in accord with the congressional design. It conforms with both Congress' explicit intent ultimately to give tribes "full regulatory authority over * * * regulation of surface mining of coal on Indian lands," 30 U.S.C. § 1300(a), and Congress' equally clear intent to postpone the actual granting of administrative authority on Indian lands pending further study of the difficult jurisdictional questions inherent in such regions. The Secretary's commendable effort to reconcile the often starkly contradictory commands of the Act is both reasonable and consistent with the general intent of Congress. Accordingly, under the controlling standard of review, the Secretary's construction of the statute he is entrusted to administer merits deference. *Chevron, supra,* 104 S.Ct. at 2782.

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[23] Absent such "authority," approval of a state program, a prerequisite of fund distribution under § 1232(g)(2), would violate the congressional objective that a state be authorized to protect the environment against the ravages of surface mining only to the extent it is an adequate surrogate for direct federal control.

III. Conclusion

Under controlling principles of administrative law, Montana's petition for review of 30 C.F.R. § 872.11(b)(3) is timely. Because the challenged regulation is in accord with congressional objectives and is a reasonable construction of the Act, we affirm its validity.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 82-2421

STATE OF MONTANA,

Plaintiff,

v.

JAMES G. WATT, Secretary of the Department of the Interior, *et al.*,

Defendants,

AND

CROW TRIBE OF INDIANS,

Intervenor.

FILED
June 30, 1983
Clerk, U.S. District Court
District of Columbia

MEMORANDUM OPINION

Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1231 *et seq.*, was enacted for the purpose of establishing a fund for reclamation and restoration of land adversely affected by past coal mining. This action challenges a regulation promulgated by the Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior (OSM), to implement the "Allocation of Funds" provisions of the Act, 30 U.S.C. § 1232(g).

Section 1232(g) of the Act provides, in pertinent part:

> (1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue

was derived as well as the national program needs for the funds.

(2) Fifty percentum of the funds collected annually in any State or *Indian reservation* shall be allocated to that State or *Indian reservation* by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. . . . (emphasis added)

30 U.S.C. § 1232(g)(1), (2). The disputed portion of the regulation replaced the term "Indian reservation" with "Indian lands." 30 C.F.R. § 872.11(b)(3).[1]

While only "Indian lands" is defined in the Act,[2] it is not disputed that this term is broader than "Indian reservation." Intervenor, Crow Tribe of Indians, asserts that this substitution was made "to make this section 'more consistent with other provisions of the Act' and to provide 'a more identifiable geographical area upon which to base its allocations.'" Memorandum of Crow Tribe of Indians at 5, quoting 43 Fed. Reg. 49,933. The preamble to the regulations states that the change was made "as a result of a memorandum from the Associate Solicitor, Division of Indian Affairs in the Solicitor's Office which concluded that the legislative history required such a change." 43 Fed. Reg. 49,933.

Section 872.11(b)(3) was originally published, along with other rules implementing the Act, on October 25, 1978. 43 Fed.

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[1]Section 872.11(b)(3) provides, in pertinent part:

An amount equal to 40 percent of the reclamation fees collected from *Indian lands* shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by the tribe under an approved Indian reclamation plan. . . . (emphasis added)

[2]"'Indian lands' means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

Reg. 49,932. On June 30, 1982 OSM revised and reprinted the regulations; however, § 872.11(b)(3) was not changed. 47 Fed. Reg. 28,574.

The case is presently before the Court on cross-motions for summary judgment. Plaintiff contends that the regulation is arbitrary, capricious, and inconsistent with law, as it exceeds the authority granted to the Secretry by the plain language of the statute. The federal defendants and Crow Tribe assert that plaintiff's challenge is untimely; and assuming *arguendo* that it is timely, the regulation is consistent with legislative intent.

Crow Tribe also argues that the "ceded strip", the main area that Montana contends is within the definition of "Indian lands" but not included in "Indian reservation", is part of the reservation. This final issue was not raised in the pleadings and, in any event, does not need to be reached by the Court.[3]

I. Timeliness of Plaintiff's Challenge.

Defendants contend, and plaintiff does not dispute, that plaintiff "participated in the rulemaking procedures leading to the issuance of Section 872.11(b)(3) of the regulations, in October 1978." Federal Defendants' Statement of Material Facts ¶ 9. Thus, the State of Montana had notice of the regulations in 1978, and had the opportunity to, and did challenge them at that time.

In 1981 OSM proposed revisions to regulations *other than* § 872.11(b)(3). At that time the Governor of the State of Montana took the opportunity to again argue that § 872.11(b)(3) is not consistent with the statute. OSM refused to change § 872.11(b)(3) and issued final rules on June 30, 1982, in which

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[3]The government also suggests that this case is not ripe since until Congress takes further action none of the money can be spent. Government Memorandum at 13-14. There is little merit to this contention, and since it is not expressly raised, it will not be specifically addressed.

it reprinted all of the rules, including the unchanged § 872.11(b)(3). Fifty-eight days later this action was filed.

Petitions for judicial review of final rules promulgated by the Secretary of the Department of the Interior (Secretary) under the Act must be filed within sixty days from the date of issuance of the rules. 30 U.S.C. § 1276(a)(1). Plaintiff asserts that the significant date is June 30, 1982, while defendants and Crow Tribe believe October 1978 was the appropriate time for judicial review.

The general rule in this Circuit was recently stated in *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 215 U.S.App.D.C. 32, 39-40, 666 F.2d 595, 602-603 (1981):

> [W]e have scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulations on demonstrable grounds of *substantive* invalidity. For example, we have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation,[48] or when changed circumstances have allegedly deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation. NRDC has cited no case, however, and we are not aware of any, that has allowed the foregoing authority to permit back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion. We have previously suggested "that those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of their issuance."[51] (other footnotes omitted)

48. *E.g.*, *Functional Music, Inc. v. FCC*, 274 (D.C.Cir.1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 81 (1959).

51. *Outward Continental N. Pac. Freight Conference v. FMC*, 385 F.2d 981, 982-83 n.3 (1967); *see also Pacific Coast European Conference v. FMC*, 376 F.2d 785, 787-788 n.4 (1967).

See also Professional Drivers Council v. Bureau of Motor Carrier Safety, No. 81-2283, slip op. at 3 n.2, 9-10 (D.C. Cir. Apr. 26, 1983).

In *Functional Music, Inc. v. F.C.C.*, 107 U.S.App.D.C. 34, 37, 274 F.2d at 546, the Court stated the following reason for sanctioning judicial review of the rules although the statutory period had expired:

> The rules here attacked were initially promulgated in 1955. It very well may be that they were then sufficiently final to support judicial review. No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible. As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity. (footnotes omitted).

In this case, however, plaintiff participated in the original rulemaking so it does not fit into the category of aggrieved parties envisioned by the court in *Functional Music*. Rather, it falls within the group of "those who have had the opportunity to challenge general rules [and] should not later be heard to complain of their invalidity on grounds fully known to them at

the time of issuance." *Outward Continental*, 128 U.S.App.D.C. 199, 200 n.3, 385 F.2d at 982 n.3.

While the United States Court of Appeals for the D.C. Circuit has made it clear that it will ordinarily allow review of agency decisions not to amend existing regulations when the claim raises substantive questions, it is in the public interest to provide review, and the agency has compiled a record, *see generally Professional Drivers Council*, slip op. at 3 n.2, 9-10, and cases cited therein, the exception applicable to parties who have previously had the opportunity to challenge the rules, embodied by *Natural Resources Defense Council* and *Outward Continental*, applies to this case. The Court, therefore finds that this action is untimely.

Nevertheless, the Court will also briefly address the substantive validity of the regulation.

II. Validity of the Regulation.

The action of OSM in promulgating the regulation must be affirmed unless such action was "arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1). This standard of review is very narrow; it accords substantial deference to the judgment of the agency. Courts must presume that the agency action was valid, and may not substitute their judgment for that of the agency. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971); *Western Coal Traffic League v. United States*, 219 U.S.App.D.C. 327, 339, 677 F.2d 915, 927, *cert. denied*, 103 S.Ct. 568 (1982); *Loyola University v. F.C.C.*, 216 U.S.App.D.C. 403, 407, 670 F.2d 1222, 1226 (1982).

The rule in question, which modifies the statutory language "Indian reservation" to "Indian lands" in determining the proper allocation of the abandoned mine reclamation fund, was engendered by a memorandum by the Associate Solicitor, Indian Affairs. *See* Exhibit 2, Crow Tribe Motion for Summary Judgment. The Associate Solicitor first stated that the Act "is at best ambiguous as to whether Congress intended the words

'Indian reservation' to mean something different from the words 'Indian lands'." He noted that Indian reservation is not defined in the Act, and then cited several instances where Congress and others have "indiscriminately used" the two terms, and other similar terms, interchangeably when discussing Indian related matters. Second, the Associate Solicitor indicated a further ambiguity in the language of a proposed section of the statute which used both terms. Third, the Associate Solicitor referred to portions of the legislative history evidencing Congress' intent to mean "Indian lands": (1) Congress intended that a percentage of the fund would go to the locale where it was collected; (2) Congress supports Indian regulation of coal mining on Indian land; and (3) if the statute was construed otherwise it would likely violate the law that States have no jurisdiction to regulate Indian lands, as well as the express prescription in the statute that "nothing in this Act shall change the existing jurisdictional status of Indian lands", 30 U.S.C. § 1300(h).

According to the legislative history the relevant portion of the statute first appeared during the 93rd Congress at § 401(e) of S. 425, as a result of amendments proferred by the Committee of Conference. H.R. Rep. No. 1522, 93rd Cong., 2dn Sess. (1974). While the conference report did not specifically address § 401(e), language in the report supports the argument that the regulation comports with Congressional intent. First, the report states that 50% of the fund is to be spent in the State where revenues are derived. Later, in the Indian lands section analysis the report indicates that the Indian tribes are to be treated like States in regard to the regulation of mining on Indian lands. H.R. Rept. No. 1522, 93rd Cong., 2nd Sess., 120 Cong. Rec. 38,280, 38,282 (1974).

Moreover, during the House debate following submission of the report it became clear that the purpose of the 50% provision was to return the funds to the State where the coal originated. 120 Cong. Rec. 38,599. This is consistent with the Associate Solicitor's analysis that to effectuate this purpose "Indian lands" is more appropriate than "Indian reservation."

In S. Rept. No. 128, 95th Cong., 1st Sess. 67 (1977), the Committee on Energy and Natural Resources specifically addressed the pertinent provision (then appearing at § 301(e)): "Fifty percent of the revenues derived from a county, school district or *lands of an Indian tribe* are to be returned to that county, school district or Indian tribe for use in accomplishing the purposes of this title." (emphasis added). The committee also reprinted a letter to Sen. Henry Jackson from then Secretary Cecil D. Andrus, which said:

> We also are of the view that the 50 percent share reserved for expenditure in the State or *Indian lands* were collected should be determined after 10 percent is allocated for hydrological studies and 20 percent for the Rural Lands Program. This would provide further funds for States having the largest amount of abandoned coal mined lands. Funds reserved to the State or *Indian land* where collected should be available for non-coal mine reclamation.

Id. at 113 (emphasis added).

On the other hand, during a debate in the Senate over another section of the Act, it was evident that at least the Senators involved in that discussion knew the difference between "Indian reservation" and "Indian lands." *See* 123 Cong. Rec. 15,608-15,610 (1977). The Crow Tribe's ceded strip is discussed. *Id.* at 15,609.

Plaintiff's position is also bolstered by the fact Congress rejected President Ford's recommendation to provide explicit authority for the Secretary to define ambiguous terms in the Act. *See* S. Rept No. 28, 94th Cong., 1st Sess. 185 (1975); S. Rept. No. 101, 94th Cong., 1st Sess. 87 (1975).

While there are persuasive arguments on both sides of the issue before the Court, the Court finds the defendants' and intervenor's position must prevail. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, es-

pecially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969) (footnotes omitted). While Congress has not addressed the regulation, the regulation has been on the books since 1978 and Congress has done nothing to change it.[4]

An appropriate Order shall issue.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

[4]Moreover, defendants point out that the fund cannot be distributed until Congress takes further action. Federal Defendants' Memorandum at 13. Thus, this issue can be submitted to Congress prior to the manifestation of any harm to plaintiff. While this fact is not sufficient for the Court to avoid the issues in this case it does mitigate plaintiff's allegation of deprivation of funds.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 82-2421

STATE OF MONTANA,

Plaintiff,

v.

JAMES G. WATT, Secretary of the Department of the Interior, *et al.*,

Defendants

AND

CROW TRIBE OF INDIANS,

Intervenor

FILED
JUNE 30, 1983
Clerk, U.S. District Court
District of Columbia

ORDER

In view of the Memorandum Opinion entered in this case on June 30, 1983, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendants' and intervenor's motions for summary judgment are granted, and it is further

ORDERED that this case is dismissed with prejudice.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1982

STATE OF MONTANA,

Appellant,

v.

WILLIAM P. CLARK, Secretary of the Department of the Interior, *et al.*

Civil Action No. 82-02421

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 6, 1985
George A. Fisher

Before Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge.

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed on November 20, 1984 be, and is hereby, amended as follows:

Page 6 3rd line from bottom of text, change "all parties agree" to read "the parties do not seriously dispute"

Page 16 7th line of text, change "§ 1232(c)" to "§ 1235" 9th line of text, change first "* * *" to "pursuant to section 1253 of this title"

10th line of text, after "*State.*" insert footnote signal "14" and insert between present footnotes 13 and 14 at the bottom of the page:

[14] Because § 1291 (25) defines "State program" to mean a program "pursuant to section 1253," a provision found in Subchapter V, Montana argues that the statutory definition of "State program" cannot refer to a state *reclamation* program established under Subchapter IV. This contention is entirely without merit. Section 1235(c) precludes approval of a state reclamation program unless the state has an approved "State regulatory program pursuant to section 1253." Approval, if any, of a state regulatory program can extend only to lands "within such State," a phrase defined to exclude Indian lands. Thus, under § 1235(c), approval of a § 1253 regulatory program that is broad enough to cover the region in question is a prerequisite to approval of a reclamation program covering that same region. This narrow statutory argument aside, we consider it highly unlikely that Congress would undertake to define "State program" and yet intend that the definition exclude operations explicitly referred to as "State programs" merely because they are provided for in Subchapter IV. *See* § 1235(a) & (d) (referring to state reclamation programs as "State programs").

Because the regulation and reclamation provisions of the statute are so interwoven, Montana's plain meaning argument has required us to examine in passing several of the Act's provisions for regulation of current and prospective mining operations. We wish to make clear that our decision is limited to the narrow question presented by this case, the rationality of a regulation providing for distribution of reclamation funds.

Renumber present footnotes 14 through 23 as 15 through 24.

Page 23 4th line from the bottom of the first full paragraph, place brackets around "associated with"

Per Curiam

For the Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 83-1982

STATE OF MONTANA
v.
WILLIAM CLARK,

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 11, 1985
George A. Fisher, Clerk

BEFORE: Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge

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ORDER

Upon consideration of the Petition for Rehearing of the Appellant State of Montana, the Motion of Westmoreland Resources, Inc., for leave to file *amicus curiae* brief in support of Appellant's Petition for Rehearing, the lodged memorandum of the Crow Tribe of Indians in opposition thereto and of the Motion of the Crow Tribe of Indians for leave to file a brief in response to Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc*, it is

ORDERED, by the Court, that the Motion of the Crow Tribe of Indians for leave to file responsive brief is granted and the Clerk is directed to file the lodged brief, and it is

FURTHER ORDERED, by the Court, that the Clerk file the lodged memorandum of the Crow Tribe of Indians, and it is

FURTHER ORDERED, by the Court, that the Motion of Westmoreland Resources, Inc. for leave to file brief as *amicus curiae* is granted, and upon consideration of all of the foregoing it is

ORDERED, by the Court, that the Petition for Rehearing of the State of Montana is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: _____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1985

No. 83-1982

STATE OF MONTANA
v.
WILLIAM CLARK, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 11, 1985
George A. Fisher, Clerk

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and McGowan, Senior Circuit Judge

ORDER

The Suggestion for Rehearing *en banc* of Appellant, the response thereto and the brief of Westmorland Resources, Inc. as *amicus curiae* have been circulated to the full Court. No member of the Court had requested the taking of a vote on the Suggestion. On consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the Suggeston for Rehearing *en banc* is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY _____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1982
Civil Action No. 82-02421

STATE OF MONTANT,

Appellant,

v.

WILLIAM P. CLARK, Secretary of
Department of the Interior, *et al.*

Appeal from the United States District Court for the District of Columbia.
Before: Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
November 20, 1984
George A. Fisher, Clerk

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

George A. Fisher, Clerk

Date November 20, 1984
Opinion for the Court filed by Circuit Judge Wright.